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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 664

J. V. DUNN, APPELLANT

V.

STATE OF LOUISIANA, APPELLEE

---

APPEAL FROM THE SUPREME COURT
OF LOUISIANA

---

STATEMENT AS TO JURISDICTION

GLADYS KESSLER
ATTORNEY AT LAW
1910 N STREET, N.W.
WASHINGTON, D. C. 20036

PAUL HENRY KIDD
COUNSEL FOR APPELLANT
310 SOUTH GRAND STREET
MONROE, LOUISIANA

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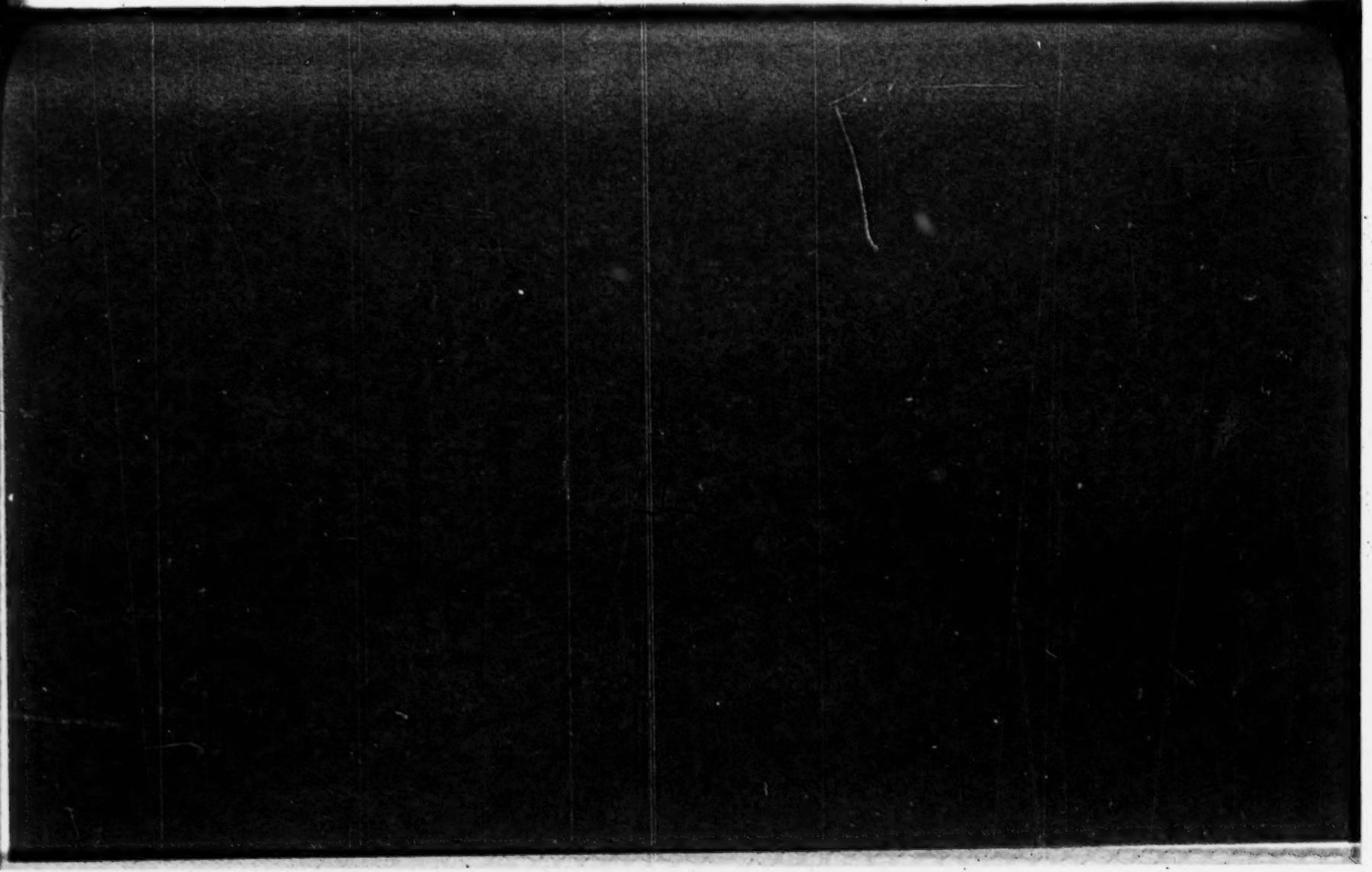

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J. V. DUNN, APPELLANT

V.

STATE OF LOUISIANA, APPELLEE

APPEAL FROM THE SUPREME COURT OF LOUISIANA

# STATEMENT AS TO JURISDICTION

The appellant, pursuant to the United States Supreme Court Rules 13(2) and 15, files this his statement of the basis upon which it is contended the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decision of the Supreme Court of Louisiana, wherein the validity of a state statute is involved, and should exercise jurisdiction in this case.

## I. OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at _____ La. _____, 223 So.2d 856 and appears in the printed appendix at page 9. No other written opinions have been delivered.

## II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This is a criminal prosecution against the appellant, J. V. Dunn. Appellant was charged and convicted in the Third Judicial District of Louisiana (Lincoln Parish), of theft in violation of Louisiana Revised Statutes, Section 14:67 (App. 13) Theft, as defined under Louisiana Revised Statutes, Section 14:67, is the theft of anything of value in excess of one hundred dollars and is punishable by ten years imprisonment, with or without hard labor. Article 782 of the Code of Criminal Procedure of Louisiana provides a trial by five man jury in which the punishment may be at hard labor. Appellant contended that Article 782 is invalid, because it is repugnant to the Sixth and Fourteenth Amendment to the Constitution of the United States. (App. 12) The decision of the Supreme Court of Louisiana was in favor of the validity of Article 782. (App. 12) Jurisdiction of this appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

The decision of the Supreme Court of Louisiana was rendreed on June 9, 1969. (App. 9) Appellant's application for rehearing was denied by that Court on June 27, 1969. (App. 9) The Notice of Appeal was filed in the Supreme Court of Louisiana, the Court possessed of the record, on September 9, 1969.

## III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves Section 1 of the Fourteenth Amendment of the United States Constitution; Article 782 of the Louisiana Code of Criminal Procedure; Article 7 Section 41 of the Louisiana Constitution; and Louisiana Revised Statute 14:67. These provisions are reprinted in Appendix A, infra.

## IV. QUESTION PRESENTED

1. Does a state statute that denies the right to trial by a jury of twelve men whose verdict must be unanimous in a prosecution of theft where a ten year sentence may be imposed violate the Sixth and Fourteenth Amendments to the United States Constitution?

2. Is a crime which carries a prison sentence of ten years with or without hard labor a serious offense as distinguished from a petty offense?

## V. STATEMENT OF THE CASE

J. V. Dunn, appellant herein, is a Negro citizen of the United States, and a resident of Lincoln Parish, Louisiana. On September 12, 1967, appellant was charged with theft of property valued at $447.58 in a bill of indictment filed in the Third Judicial District Court of Louisiana. (TR-5) Theft of anything of value of one hundred dollars or more is a crime punishable by a sentence, with or without hard labor, for not more than ten years. La. Rev. Stat. 14:67 (1942) Because theft of anything of value of one hundred dollars or more may be punishable by imprisonment without hard labor, the crime is tried by a jury of only five jurors. L.S.A.-C.Cr.P Art. 782.

On October 25, 1968, prior to trial, appellant filed a "MOTION FOR A TWELVE MAN JURY TRIAL!" (TR-12) On October 28, 1968, the motion was heard. Appellant contended that the right to be tried by a jury of twelve jurors was secured to him by the Sixth and Fourteenth Amendments to the United States Constitution. The motion was denied by the trial judge on the authority of Article 782 of the Louisiana Code of Criminal Procedure. Appellant was then tried by a jury of five jurors.

The charge against appellant was based on the fact

that appellant, while cutting timber, which he had contracted to buy, on certain property, had in fact gone beyond the boundary of said property, and cut timber on the adjoining tract. The factual dispute between appellee and appellant was whether appellant knew or did not know he was cutting on the adjoining tract of land.

The five man jury partly resolved the factual dispute by returning a verdict against the defendant. However, the verdict itself indicates the jury was not completely satisfied with resolution of the factual dispute; the verdict itself stated: "The Jury finds the defendant guilty as charged— The Jury also recommends mercy." (TR-11) On November 25, 1968, appellant perfected a formal bill of exception on the issue of the twelve man jury trial issue. (TR-13) Appellant was then sentenced to serve four years in the state penitentiary. (TR-4)

On November 25, 1968, after timely perfecting his bill of exception, appellant filed a motion for appeal to the Supreme Court of Louisiana. (TR-12) Appellant contended in his brief to the Supreme Court of Louisiana that a defendant's right to be tried by a jury of twelve men whose verdict must be unanimous in serious criminal cases had already been decided, in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.CT1444, 20 L.Ed 491 (1968) On June 9, 1969, the Supreme Court of Louisiana rejected appellant's contention and upheld the validity of Article 782 of the Code of the Criminal Procedure of Louisiana, by concluding

> "Counsel is in error in his appreciation of the holding of the court in the Duncan case." (App. 10)

On June 27, 1969, the Supreme Court of Louisiana denied appellant's application for a rehearing without written opinion. The Supreme Court of Louisiana is the highest court in the State of Louisiana. Appellant is free on bond

set by the trial court and has been granted a stay of execution by the Supreme Court of Louisiana pending disposition of the matter in this Court.

## VI. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The opinion of the Supreme Court of Louisiana is ambiguous and evades the question presented, i.e. Is a defendant charged with a crime that carries a penalty of ten years imprisonment entitled to a jury trial of twelve men whose verdict must be unanimous? While evading the question presented, the Supreme Court of Louisiana casts an interpretation of what this Court stated in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct.1444, 20 L.Ed 491 (1968), that is clearly contrary to the meaning that this Court intended to give.

Footnote 30 of *Duncan v. Louisiana* is presented for clarification:

> "Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the federal courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. In particular, Louisiana objects to application of the decisions of this Court interpreting the Sixth Amendment as guaranteeing a 12-man jury in serious criminal cases, *Thompson v. Utah*, 170 US 343, 42 L Ed 1061, 18 S Ct 620 (1898); as requiring a unanimous verdict before guilt can be found, *Maxwell v. Dow*, 176 US 581, 586, 44 L Ed 597, 599, 20 S Ct 448 (1900) and as barring procedures by which crimes sub-

ject to the Sixth Amendment jury trial provision are tried in the first instance without a jury but at the first appellate stage by a de novo trial with a jury, *Callan v Wilson*, 127 US 540, 32 L Ed 223, 228, 8 S Ct 1301 (1888). It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the States have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four States in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However 10 States authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a de novo trial before a jury in a different court. The statutory provisions are listed in the briefs filed in this case.

The opinion of the Supreme Court of Louisiana

The opinion of the Supreme Court of Louisiana implied either a crime carrying a sentence of ten years with or without hard labor is not a serious crime and/or such a crime is one in which the trial procedures would not have to be changed. The latter premise is predicated upon the Supreme Court of Louisiana's quotation from the Duncan case that ". . .our decision today will (not) require widespread charges in criminal processes." The former premise can only be inferred from the apparent assigned reason

for upholding appellant's conviction, to-wit: A direct *partial* quotation from *Duncan v. State of Louisiana* ". \ .Thus, we hold no constitutional about the practices, common in both federal and state courts, of accepting waiver of jury trial and prosecuting *petty* crimes without extending a right to a jury trial." Since there was no question of waiver of jury trial in this case, one can only infer that the Supreme Court of Louisiana considered the crime of theft charged against appellant to be a petty crime.

This Court did not decide in *Duncan v. Louisiana* what were or were not serious crimes, nor did it decide whether a twelve man jury whose verdict must be unanimous was required in trials in which the accused was charged with a serious offense. However, Justice White in footnote 30 did respond to this contention put forth by the State of Louisiana in *Duncan v. Louisiana.* It is submitted that the "widespread change" referred to by Justice White in footnote 30 simply was a quantative analysis of the number of states which would have to change their jury trial processes. In the same footnote, Justice White goes on to clarify this analysis by stating: (1) most states have jury trials equal in breadth to the Sixth Amendment; (2) In only four States can juries of less than twelve be used without the defendant's consent; and (3) Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense carrying a penalty greater than one year. What Justice White and the majority said in *Duncan v. Louisiana* is amplified by former Justice Fortas view of what the majority had decided. Justice Fortas joined the judgment and opinion of the Court in *Duncan v. Louisiana,* but was of the opinion that not all federal requirements such as a unanimous verdict of a jury of twelve should be imposed on the states. *Duncan v. Louisiana* must be clarified.

More is involved here than the determination of a

numerical requisite for criminal jury trials. It is submitted that the verdict rendered by the jury in this case ("...The Jury finds the defendant guilty as charged—The Jury also recommends mercy.") would have been at least a hung jury had the jury been composed of twelve men instead of five. In Louisiana, particularly in North Louisiana, which was the site of this trial, most of the defendants tried by juries are Negroes, as is the appellant. Likewise, because Negroes are seldom, if ever, prosecuted for crimes involving other Negroes as complainants, jury trials are too often reduced to racial considerations. Consequently, the twelve man jury is often the only safeguard to procedural due process that many defendants facing serious criminal charges receive. Persons accused of serious crimes in Louisiana are entitled to the same twelve man jury guarantee as are persons similarly situated in 46 of the other states; they are no less entitled to the same unanimous verdict required by every other state except Oregon. The questions are substantial.

## CONCLUSION

The questions presented, are in fact one question: Is a person accused of a crime carrying a penalty of ten years imprisonment, with or without hard labor, entitled to receive a trial by twelve jurors whose verdict must be unanimous? It is submitted that this question was answered affirmatively by this Court in *Duncan v. Louisiana*. It is, therefore, suggested that this Court may find this case an appropriate one for reversal without further argument.

Respectfully submitted,

PAUL HENRY KIDD
COUNSEL FOR APPELLANT
310 SOUTH GRAND STREET
MONROE, LOUISIANA 71201

**STATE OF LOUISIANA**

**V.**

**J. V. DUNN**

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT**
**PARISH OF LINCOLN**
**HON. J. R. DAWKINS, JUDGE**

FOURNET, Chief Justice.

The defendant J. V. Dunn, prosecutes this appeal from his conviction and sentence to serve four years in the state penitentiary on a charge by bill of indictment with the theft of property[1] valued at $447.58 in violation of L.R.S. 14:67,[2] relying for the reversal thereof on a single bill of exception timely reserved and perfected to the overruling by the trial judge of his pretrial motion for a twelve man jury.[3]

Counsel for defendant contends that under the guarantees of the 6th Amendment to the Constitution of the

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1. The property for which defendant was charged with theft consisted of 5,984 board feet of pine saw logs, 2,502 board feet of hardwood saw logs, 18.34 cords of pine pulpwood and 7.44 cords of hardwood pulpwood.

2. "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

"Whoever commits the crime of theft, when the misappropriation or taking amounts to a value of one hundred dollars or more, shall be imprisoned, with or without hard labor, for not more than ten years. * * *." (Emphasis added.)

3. Under the express provisions of Section 41 of Article 7 of our Constitution of 1921 it is provided, "* * * Cases in which punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict. * * *." See, also Article 782, Code of Criminal Procedure.

United States[3] appellant, having been charged with a serious offense subject to a possible penalty of 10 years imprisonment, was entitled to a trial by a twelve man jury whose verdict must be unanimous, citing as authority therefor the decisions of the United States Supreme Court in the cases of *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct 1444, 20 L.Ed2d 491, and *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct 620, 42 L.Ed 106.

Counsel is in error in his appreciation of the holding of the court in the Duncan case. The United States Supreme Court in that case merely held, "* * *That in the American States, as in the federal judicial system, a general grant of a jury trial for serious offenses is a fundamental right essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. * * *Thus, we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waiver of jury trial and prosecuting petty crimes without extending a right to a jury trial."

A reading of the case of *Thompson v. Utah, supra*, will readily disclose that it is inapposite from a factual as well as a legal standpoint.[4] Moreover, the inapplicability of

---

3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted iwth the witnesses against him; to have compulsory process for obtaining Witnesses in his favor and to have the Assistance of counsel for his defense."

4. Thompson, having been granted a new trial of his conviction for grand larceny when Utah was a Territory, was again convicted when tried after the admission of Utah into the Union whereby it was provided in its constitution that, "In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors." The United States Supreme Court, in reversing his conviction, held that was an ex post facto law in its application to felonies committed before the Territory became a State, because at the time of the commission of the crime the accused was given the right under the Constitution of the United States, being the law of the Territory, to be tried by a jury of twelve.

the Thompson case to the one under consideration was clearly demonstrated by the United States Supreme Court in the course of its opinion in the Duncan case wherein they observed Louisiana objected to the application of the decision of the court interpreting the 6th Amendment as guaranteeing a 12 man jury, citing the Thompson case, to which the court declared in footnote 30, "It seems very unlikely to us that our decision today will require widespread changes in state criminal processes," pointing out, "First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision."

For the reasons assigned the conviction and sentence are affirmed.

# APPENDIX

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### ARTICLE VII. SECTION 41 OF THE LOUISIANA CONSTITUTION:

. . .All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

### ARTICLE 782, CODE OF CRIMINAL PROCEDURE OF LOUISIANA:

Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a ver-

dict. Cases in which the punishment may be at hard labor shall be composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article 780, trial by jury may not be waived.

**LOUISIANA REVISED STATUTES, SECTION 14:67**

Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

Whoever commits the crime of theft, when the misappropriation or taking amounts to a value of one hundred dollars or more, shall be imprisoned, with or without hard labor, for not more than ten years.

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1969

## No. 664

J. V. DUNN,

Appellant,

versus

STATE OF LOUISIANA,

Appellee.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

## MOTION TO DISMISS THE APPEAL OR AFFIRM

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM P. SCHULER
Second Assistant Attorney General

RAGAN D. MADDEN
District Attorney
Third Judicial District,
State of Louisiana

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

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NO. /

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J. V. DUNN,

Appellant,

versus

STATE OF LOUISIANA,

Appellee.

---

Appeal from the Supreme Court of Louisiana

---

Motion to Dismiss the Appeal or Affirm

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States and in compliance with the request of court moves to affirm the judgment of the Louisiana Supreme Court, or in the alternative to dismiss the same on the grounds that the question is so unsubstantial as not to warrant further argument.

## STATEMENT

This is an appeal from a judgment of the Louisiana Supreme Court affirming the conviction of appellant for the crime of theft, the value of which exceeded the

sum of $100.00 (La. R.S. 14:67). Upon conviction of this crime the defendant is subject to imprisonment of not more than ten years with or without hard labor.

The basic contention of appellant is twofold: First, that he was convicted of a serious offense; and, secondly, that he should have been accorded a twelve man jury which should have had to return a unanimous verdict. Under the laws of Louisiana for an offense punishable with or without hard labor, a defendant is entitled to a five man jury which must return a unanimous verdict (C.Cr.P. 782).

Since the State of Louisiana conceeds that the crime of which defendant was convicted is a serious offense, and, further, since the jury verdict was unanimous the sole question presented would appear to be: Is a twelve man jury a necessity in a case of this type?

## ARGUMENT

The sole basis for appellant's argument in this case is the hope that *Duncan v. La.*, 391 U.S. 145, has grafted the Sixth Amendment jury right trial onto state criminal proceedings via the due process clause of the Fourteenth Amendment. A careful analysis of the *Duncan* case negatives this assumption. The plurality opinion holds that where the possible penalty may be two years imprisonment, a jury trial is a necessity in order to afford due process of law. No where in the opinion did the court state that the jury must consist of twelve men, must be unanimous, or that the court must be permitted to comment on the facts.

This is apparent from the language of the decision itself:

> 391 U.S. at p. 149
> "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee."
>
> 391 U.S. at p. 154
> "We are aware of prior cases in this Court in which the prevailing opinion contains statements contrary to our holding today that the right of jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction. Louisiana relies . . ."
>
> 391 U.S. at p. 159
> "It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States."

The concurring opinions add little to the interpretation of the plurality opinion since one merely beats

the drums for the total absorption doctrine while the other adopts the principle that the state should be permitted, within constitutional limits, to experiment in the field of law enforcement.

It would, indeed, be somewhat humorous, if such serious issues were not presented, to contend that the magical number twelve is synonymous with fairness.

Indeed, what is so fundamental to fairness about a twelve man unanimous jury?[1] It has been stated by legal commentators and historians that the number 12 was chosen in analogy to the twelve prophets and twelve disciples; or possibly the twelve stones referred to in Bible history; and the institution of twelve judges selected in ancient days to try matters of law are stated to be a possible precedent. Additionally there might be mentioned the Roman Code of the twelve tables and the fact that among Scandinavian nations twelve was a favorite number for constituting a court. Some legal scholars believe that the number twelve was adopted among the Anglo-Saxon and Normans from the twelve witnesses whom they believe sufficient to establish the credibility of a party to a transaction. It has even been suggested that the "twelve men good and true" represent the twelve Apostles and are divinely endowed with a unique fact finding ability. See

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[1]Osborn, a document specialist after more than twenty five years observing jury trials throughout the United States, observed in *The Mind of the Juror* (Boyd Printing Company 1938) that jury fixers know that whenever the requirements of a unanimous twelve man verdict exists, it is necessary to reach only one juror in order to defeat justice.

Robert Moschzisker Trial by Jury (1922), pages 290-291; Silving Essays on Criminal Procedure, (Dennis and Co. 1964) page 53.

Jeremy Bentham said "Antiquity of the law is not reason. The antiquity of a law may create a prejudice in its favour, but it is not a reason of itself ..." "Arbitrary definition is not reason. Nothing is more common among jurists and political writers than to build up theories, and even to construct huge works upon definitions that are purely arbitrary". Dumont's Bentham, *Principles of Legislation,* translated by John Neal (1830), pages 286, 287.

Neither antiquity nor arbitrary definition constitute any reason for holding that the unanimous agreement of an arbitrary number of twelve men, possibly based on superstition, is the only method of producing a fair finding of fact.

The absurdity that results from relying on ancient forms of common law trial by jury is illustrated in a recent state criminal proceeding in Baton Rouge, Louisiana, reported in the Baton Rouge Morning Advocate of November 17, 1967. In that case the accused argued that if the word "peers" is defined as "persons of the same rank or standing" a nineteen year old defendant should be tried before a jury composed only of nineteen year olds.

This court has not hesitated to reject the English common law in certain instances when it did not measure up as a standard by which to determine the rights

of Americans. See *Powell v. Alabama*, 287 U. S. 45, 65 (1932); (Common law right of counsel in misdemeanors but not felonies rejected); *Grosjean v. American Press Co.*, 297 U. S. 233, 249 (1936) (Common law licensing of the Press rejected); *Mallory v. Hogan*, 378 U.S. 1 (1964) (Common law rule that the admissibility of evidence is not affected by the illegality of the means through which the evidence was obtained was rejected); See Deutsch, *Civil Law Influences on the Development of Civil Liberties*, 12 Tulane Law Review, 331 (1938); Orfield's *Searches and Seizures in Federal Criminal Cases*, 24 La. Law Review, 665, 666 (1964); *The Challenge of Crime in a Free Society;* a report by the President's Commission on Law Enforcement and Administration of Justice, page 306, note 18.

## CONCLUSION

For the reasons previously assigned it is urged that the appeal in this case should be dismissed or, in the alternative, the judgment of the Louisiana Supreme Court affirmed.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM P. SCHULER
Second Assistant Attorney General

RAGAN D. MADDEN
District Attorney
Third Judicial District,
State of Louisiana

**CERTIFICATE**

I, William P. Schuler, a member of the Bar of the United States Supreme Court, hereby certify that a copy of the above and foregoing brief has been served on counsel for appellant:

PAUL HENRY KIDD
310 South Grand Street
Monroe, Louisiana 71201

GLADYS KESSLER
1910 N. Street, N.W.
Washington, D.C. 20036

by placing same in the United States Mail, properly addressed, with sufficient postage thereto affixed.

New Orleans, Louisiana, this ____ day of January, 1970.

WILLIAM P. SCHULER